Petition

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ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1981

No.

EUGENE SUSSLI,

Petitioner

vs.

CITY OF SAN MATEO,
A MUNICIPAL CORPORATION, *et al.*,

Respondents

Petition for a Writ of Certiorari to
The Court of Appeal
of the
State of California,
First Appellate District, Division One

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QUESTION PRESENTED

Whether municipal government may, consonant with the guarantees of the First and Fourteenth Amendments of the United States Constitution, absolutely prohibit the posting of political signs on public property.

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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

No.

EUGENE SUSSLI,
Petitioner

vs.

CITY OF SAN MATEO, A Municipal
Corporation, et al.,
Respondents.

Petition for a Writ of Certiorari to
The Court of Appeal
of the
State of California,
First Appellate District, Division One

Petitioner, Eugene Sussli, respectfully prays that a Writ of Certiorari be issued to review the judgment and

opinion of the Court of Appeal of the State of California, First Appellate District, Division One.

OPINIONS BELOW

The order of the Supreme Court of California denying a hearing, which is reproduced in the appendix (p. A-1, infra), is reported in the Advance Sheets for 29 Cal.3d (Cal. Official Reports No. 21, Aug. 4, 1981, Minutes, p. 3). The opinion of the California Court of Appeal, which is reproduced in the appendix (p. B-1, infra), is reported at 120 Cal.App.3d 1, 173 Cal.Rptr. 781 (1981). The memorandum decision and the findings of fact and conclusions of law of the San Mateo Superior Court were not reported. The memorandum decision and the findings are reproduced in the appendix at pp. C-1 and D-1, infra, respectively.

JURISDICTION

On May 14, 1981, the Court of Appeal filed its judgment. On June 12,

1981, a timely petition for rehearing to the Court of Appeal was denied. On July 8, 1981, the Supreme Court of California denied petitioner's petition for hearing and this petition for a writ of certiorari was filed within 90 days of that date. This Court has jurisdiction to hear this matter under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether municipal government may, consonant with the guarantees of the First and Fourteenth Amendments of the United States Constitution, absolutely prohibit the posting of political signs on public property.

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution:

Congress shall make no law...abridging the freedom of speech....

Fourteenth Amendment, United States Constitution:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This appeal challenges the constitutionality of Municipal Code of San Mateo §25.04.090:

> 25.04.090 POSTING ON PUBLIC PROPERTY PROHIBITED. No person, except a duly authorized public officer or employee, shall erect, construct or maintain, paste, paint, print, nail, tack or otherwise fasten or affix, any card, banner, handbill, campaign sign, poster, sign, advertisement, or notice of any kind, or cause or suffer the same to be done, on any

> curbstone, lamppost, pole, bench, hydrant, bridge, wall, tree, sidewalk, or structure in or upon any public street, alley, or upon any other public property, except as may be required or permitted by ordinance or law; no person shall deface, mar or disfigure any bridge, fence, building or other structure belonging to city, or any tree located in any public property or place, by painting, cutting, scratching or breaking the same, or attaching or affixing anything thereto.

This case also involves Municipal Code of San Mateo §§25.04.140 and 25.12.130 which are set out in the appendix at p. E-1, infra.

STATEMENT OF THE CASE

The petitioner, Eugene Sussli, was a candidate for the City Council of

San Mateo, California in an election held on March 8, 1977. In early February, 1977, campaign signs supporting petitioner and another city council candidate, John Condon, were placed upon public property within the city.

On February 8, 1977, the City Attorney of San Mateo sent a letter to all candidates for city offices apprising them that posting of campaign signs on public property was prohibited by Municipal Code §25.04.090. The letter requested that all campaign signs be removed from public property and stated that the city would itself remove those campaign signs remaining on public property on February 14, 1977. The letter also informed candidates that under the San Mateo Municipal Code, signs could be posted on private property but reminded them that, before such signs could be posted, the permission of the owner of the property had to be obtained. Candidates were provided with a copy of Municipal Code §25.12.130 which regulates the timing and

placing of election signs on private property.

San Mateo city personnel took down Sussli's and Condon's signs after the candidates refused to remove the signs themselves. The candidates thereupon filed suit.[1]

On April 8, 1977, the San Mateo Superior Court issued an order restraining the city from removing election signs of candidates for public office posted on public property. Following a trial on the merits in August, 1979, the Superior Court issued its judgment dissolving the

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1. The suit named as defendants the City of San Mateo and various city officials. Those officials were Jane Baker, Floyd Welch and James Chambers, Members of the San Mateo City Council; Richard B. DeLong, the City Manager; Richard H. Coleman, the Director of Community Development; J. L. Coppock, the Police Chief; and Maurice K. Hamilton, the City Attorney.

restraining order and finding Municipal Code §25.04.090 constitutional.

Sussli appealed that decision to the Court of Appeal of the State of California, First Appellate District.[2] The Court of Appeal's majority conceded that substantial First Amendment interests are involved in the display of political posters adjacent to public thoroughfares, but concluded that those interests are outweighed here by the public's interest in the visual harmony of the areas in which they live. A dissenting opinion by the court's presiding justice reasoned that because the ordinance prohibits the exercise of a fundamental individual liberty within the traditional public forum which has been entrusted to the public for purposes of free expression, the ordinance is constitutionally defective.

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2. Mr. Condon died while the matter was pending in the Superior Court.

REASONS FOR GRANTING THE WRIT

This case raises an important question concerning the authority of local communities to bar completely from the public forum a particularly accessible means of expression protected by the First Amendment.

This Court has long recognized that "streets and parks...have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions." Hague v. C.I.O., 307 U.S. 496, 515 (1939) (opinion of Justice Roberts joined by Justice Black.) In fact, this principle has consistently been the starting point "in considering the right of a municipality to control the use of public streets for the expression of religious [or political] views." Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Kunz v. New York, 340 U.S. 290, 293 (1951).

See, also Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969).

The ordinance at issue here closes all public property to posting of signs and was applied to prohibit the posting of temporary political signs on such property during an election campaign. In its opinion below, the Court of Appeal concluded that "the First Amendment interests involved in the display of political posters adjacent to public thoroughfares are substantial in nature". 120 Cal.App.3d at 7, 173 Cal.Rptr. at 785, quoting Baldwin v. Redwood City, 540 F.2d 1360, 1368 (9th Cir. 1976). Nonetheless, it agreed with respondent's argument that an absolute prohibition on posting of all kinds of signs on public property can be justified by considerations of traffic safety and aesthetics.

Petitioner does not dispute that traffic safety and aesthetics are legitimate concerns of municipal government. But "the Court must not only assess the substantiality of the

governmental interests asserted but also determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment." Schad v. Borough of Mount Ephraim, ___ U.S. ___, 101 S.Ct. 2176, 2183 (1981); see also, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980). San Mateo has already adopted various restrictions on signs posted on private property less encompassing than a total ban (see, e.g., Municipal Code of San Mateo §§25.04.104 and 25.12.130). Those regulations achieve San Mateo's goals of traffic safety and aesthetics. It can adopt similar regulations, modified as necessary, restricting the placement, size and type of signs, and the manner and duration of their posting on public property. San Mateo's decision to adopt an absolute prohibition instead of these less restrictive rules results in an overbroad ordinance which does not comply with this Court's admonition that

"[p]recision of regulation must be the touchstone" when regulating First Amendment activity. N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963).[3]

As the Court of Appeal noted below, "whether--and under what circumstances--public property must be made available as a forum for First Amendment activities has yet to be definitively determined." 120 Cal.App.3d at 5n, 173 Cal.Rptr. at 783n. The answer to that question must be considered in light of the particular means of

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3. In Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), the Ninth Circuit upheld municipal ordinances governing the size of temporary signs and the number of signs permitted on any particular piece of property. Id. at 1368-1369. It also suggested that it is constitutionally permissible to limit the period during which a sign may be posted to sixty days before and ten days after the event announced. Id. at 1363 n.1, 1370.

expression used. Metromedia, Inc. v. City of San Diego, ___ U.S. ___, 101 S.Ct. 2882, 2889, 2902, 2918 (1981).[4] The

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4. For example, the temporary political signs at issue in this case are different from the billboards considered in Metromedia. As both this Court and the California Supreme Court recognized, billboards are "large, immobile, and permanent structures" which, because they are "designed to stand out and apart from [their] surroundings...[create] a unique set of problems for land-use planning and development." 101 S.Ct. at 2889-2990. Temporary political signs, in contrast with billboards, are devoted solely to non-commercial speech which is fully protected by the First Amendment. Ohralik v. Ohio Bar Association, 436 U.S. 447, 456 (1978). Also in contrast with billboards, temporary political signs cannot cause permanent land-use planning problems for a community.

particular issue here--whether the government can bar the public from posting campaign signs on public property[5]--is a question which urgently requires decision by this Court for a number of reasons:

1. Prohibitions Against Signs On Public Property Are Widespread.

The City of San Mateo's ordinance at issue here is not an isolated example of a prohibition of signs from public property. In the Court of Appeal below, an amicus brief was filed on behalf of 48 California cities who had similar ordinances. The infringement of the exercise of First Amendment rights involved in the banning

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5. The issue of whether public property can be entirely closed to signs and posters has been the subject of considerable discussion by the commentators. See particularly Stone, "Fora Americana: Speech in Public Places," 1974 Supreme Court Review 233.

of sign posting on public property is, therefore, not a phenomenon unique to San Mateo.

2. Political Signs Are A Particularly Important Means Of Communicating Ideas.

The impact of San Mateo's ordinance and others like it is magnified by the nature of the means of communication which they restrict. As the Ninth Circuit concluded in Baldwin v. Redwood City,

> [P]olitical posters have unique advantages. Their use may be localized to a degree that radio and newspaper advertising may not. With exception of handbills, they are the least expensive means by which a candidate may achieve name recognition among voters in a local election.

540 F.2d at 1368 (1976). See also Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977).

These unique advantages make it particularly important that this Court consider whether the significant restrictions imposed on sign posting by ordinances such as San Mateo's are consistent with constitutional guarantees of free speech.

3. The San Mateo Ordinance Leaves Control Of An Important, Inexpensive Means Of Communication In The Hands Of Private Property Owners Alone.

One particularly pernicious effect of an absolute ban on posting of public property is that it severely limits the access of those espousing views unpopular with one group in society to an important and inexpensive means of promoting their ideas. San Mateo's ordinance permits posting of election signs on private property but only with the permission of the owner of that property. San Mateo Municipal Code §25.12.130, Appendix, p. E-1, infra. Even respondent conceded in the trial court

that the result of this requirement for obtaining approval is that "for a newcomer to a community or for a proponent of an unpopular cause, securing such sites [for signs on private property] might prove somewhat burdensome." Certified Transcript 135. In fact, a candidate taking positions unpopular with owners of private property, for example a proposal to increase substantially taxes on private real estate,or to institute rent control, is likely to be virtually barred from posting any signs in support of his views anywhere in San Mateo.[6]

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6. The Court of Appeal agreed that "some pragmatic persuasion" attached to Petitioner's claim that some persons would be effectively cut off from alternative channels of communications because of cost constraints or the nature of their message. 120 Cal.App.3d at 8n, 173 Cal.Rptr. at 785n. It refused, however, to recognize the standing of Petitioner, who it claimed was not so constrained, to

Of course, the state does not have an obligation to make all means of expression available to all citizens at all times or somehow otherwise to equalize the opportunity of each citizen to express his particular ideas. But, likewise, it does not have the right to restrict use of an otherwise particularly accessible means of communicating ideas in a way which effectively shuts out one set of unpopular

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6. (Continued) raise the injuries to the First Amendment rights of others not before the court. In so doing, the court failed to apply the overbreadth exception, applied in First Amendment cases, to the usual standing requirement. This Court's most recent statement of that exception in Schad v. Borough of Mount Ephraim, _____ U.S. _____, 101 S.Ct. 2176, 2181 (1981), makes clear that where, as here, petitioner's claim is "rooted in the First Amendment, [he is] entitled to rely on the impact of the ordinance on the expressive activities of others as well as [his] own."

ideas, especially when the government's legitimate objectives can be achieved by less restrictive means.

4. Sign Posting Is Not Incompatible With Normal Activity In All Public Places

The Court should also act because the San Mateo ordinance, and others like it, disregard this Court's rule that in determining whether First Amendment activity can be restricted in a public place,

> [the] crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

Adopting an absolute ban on a particular means of expression on public property does not somehow excuse a municipality from complying with this rule. To find otherwise would mean that

the weight to which First Amendment rights are entitled varies with the type of regulation adopted. That simply cannot be the case. An absolute ban on sign-posting, therefore, can be justified only if sign-posting is basically incompatible with the normal activity on all public property at all times.

An ordinance which precludes sign posting in public places does not reflect the care and precision in drafting mandated by Grayned. Signs may be inappropriate in some public places, such as an arboretum or a golf course. In others, however, such as beside a public thoroughfare in an urban area where there are already numerous signs, signs are not basically incompatible with normal activity. Neither the aesthetics nor the safety of the community need suffer any more from carefully regulated sign-posting in designated public places for limited times than they do from the regulated sign-posting on private property already permitted in San Mateo.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the Court of Appeal of the State of California, First Appellate District, Division One.

Dated: October 5, 1981

Respectfully submitted,

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APPENDIX A

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
1ST DISTRICT, DIVISION 1, CIVIL NO. 46085

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANC

[Filed July 8, 1981]

Sussli
v.
City of San Mateo, etc., et al.

Appellant's petition for hearing DENIED.

/s/ Bird
Chief Justice

APPENDIX B

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

1 Civil 46085
(Super Ct. No. 210801)

EUGENE SUSSLI,
Plaintiff and Appellant,
v.
CITY OF SAN MATEO,
a municipal corporation, et al.,
Defendants and Respondents.

Appellant Eugene Sussli was a candidate for the San Mateo City Council in an election held on March 8, 1977. Prior to the election, campaign signs supporting the candidacy of appellant and the re-election of another candidate, John Condon, were posted on public property

within the city. On February 8, 1977, the city attorney sent a letter to all candidates, including Sussli, informing them that sign posting on public property was prohibited by local ordinance § 25.04.090, reproduced verbatim in the margin,[1] and requesting that all such campaign signs be

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1. Section 25.04.090 reads as follows: "POSTING ON PUBLIC PROPERTY PROHIBITED. No person, except a duly authorized public officer or employee, shall erect, construct or maintain, paste, paint, print, nail, tack or otherwise fasten or affix, any card, banner, handbill, campaign sign, poster, sign, advertisement, or notice of any kind, or cause or suffer same to be done, on any curbstone, lamppost, pole, bench, hydrant, bridge, wall, tree, sidewalk or structure in or upon any public street, alley, or upon any other public property, except as may be required or permitted by ordinance or law; no person shall deface, mar or disfigure any bridge, fence, building or other structure belong-

removed no later than the following week under threat of summary removal by city officials. The letter also advised that under applicable ordinance provisions, sign posting on private property was permissible with the consent of the owner of the property. A copy of the ordinance regulating the time, manner and placement of an "election sign" was included with the written notification.[2]

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1. (Continued) ing to city, or any tree located in any public property or place, by painting, cutting, scratching or breaking the same, or attaching or affixing anything thereto."

2. Under the provisions of the ordinance (§ 25.12.130) - only peripherally involved herein - the placement of an election or temporary sign on private property is authorized upon the issuance of a city permit, pursuant to conditions requiring the owner's consent and placement and removal no earlier than six weeks before and ten days after the election date,

When the candidates refused to comply with the written request, city personnel undertook removal of the offending signs, resulting in the institution of suit for injunctive and declaratory relief. At the conclusion of the hearing the trial court made its decision upholding the ordinance prohibiting the posting of campaign signs on all public property with its attendant sanction of summary removal. Following the adoption of written findings and conclusion and entry of formal judgment, candidate Sussli instituted this appeal.[3]

The principal theory of the complaint is that the challenged ordinance constitutes an impermissible abridgement of the right of free speech guaranteed

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2. (Continued) respectively. Issuance of the permit is further conditioned upon payment of a refundable $25 deposit, subject to forfeiture in the event of noncompliance with the removal condition.

3. We are advised that Mr. Condon died sometime after the filing of suit.

under the provisions of the federal and state constitutions.[4] Respondents denied the charging allegations and affirmatively alleged that the ordinance was justified on the grounds of overriding governmental interests.[5]

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4. Unless the context of our discussion indicates otherwise, reference to First Amendment rights is intended to include the similar guaranty under California Constitution article I, section 2.

5. The public interests to be served were enumerated as follows: 1) prevention of damage to public property; 2) preservation of public confidence in the neutrality of elections; 3) protection of the public from the blare of political propaganda; 4) avoidance of administrative burdens associated with the need to monitor the placement of signs on public property and their eventual removal; 5) preservation of the prominence of public signs and lines of sight in the interests of traffic safety; and aesthetic consider-

On appeal, while conceding that the right to erect or post signs on public property is subject to reasonable regulations for legitimate governmental purposes, Sussli asserts that the absolute ban imposed by the ordinance of a protected First Amendment interest is constitutionally defective on its face. Moreover, he argues, the governmental interests advanced cannot justify what amounts to an overbroad restriction on the right of free speech.

Respondents counter that the uniform imposition of the prohibition against sign posting on any public property does not represent an unlawful intrusion into traditional forums for protectible First Amendment activities. Alternatively,

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5. (Continued) ations. The trial court expressly found that in light of the permissible posting of election signs on private property, all of such interests were substantial in relation to the incidental restriction imposed on public property sign posting as a means of expression.

with heavy reliance placed upon the relevant criteria announced in Baldwin v. Redwood City (9th Cir. 1976) 540 F.2d 1360, they argue that the governmental interests promoted by the ordinance as found below justify any incidental restriction imposed on the exercise of First Amendment rights.

The precise question presented - characterized by the parties as whether a city may totally prohibit the posting of political signs on public property within the city - is apparently one of first impression.[6] The significance of that

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6. Whether - and under what circumstances - public property must be made available as a forum for First Amendment activities has yet to be definitively determined. (Dulaney v. Municipal Court (1974) 11 Cal.3d 77, 83, fn. 6; Wirta v. Alameda Contra Costa Transit Dist. (1967) 68 Cal.2d 51, 54.) In a closely analogous factual setting, one California court has suggested by way of dictum that total

central issue is underscored in Amici's brief on behalf of 48 California cities who had ordinances similar to the ordinance under review.

Sussli's initial attack on the facial validity of the ordinance focuses upon the mode of expression as a form of protected speech which cannot be entirely banned from a traditional forum for the exercise of First Amendment rights. Thus, the argument continues, once First Amendment protection is extended to the means of communication such as sign posting, any legislative attempt to ban outright such protected medium of speech from the public forum is unconstitutional per se.

In fact the courts have repeatedly recognized that virtually all modes of

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6. (Continued.) prohibition may be justified upon rppof of legitimate governmental interests. (See People v. Katx (1977) 70 Cal.App.3d Supp. 1, 8; cf. Brayton v. City of Anchorage (Alaska, 1963) 386 P.2d 832.)

communication used to disseminate ideas and protected expression on the public streets fall within the protective umbrella of the First Amendment. (Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal.3d 294, 301-302 [news racks]; Police Department of Chicago v. Mosley (1972) 408 U.S. 92 [picketing]; Schneider v. State (1939) 308 U.S. 147 [leafletting]; Welton v. City of Los Angeles (1976) 18 Cal.3d 497 [roadside map sales]; Dulaney v. Municipal Court, supra, 11 Cal.3d 77 [sign posting on public utility poles]; Dillon v. Municipal Court (1971) 4 Cal.3d 860 [demonstrations and parades]; Wollam v. City of Palm Springs (1963) 59 Cal.2d 276 [sound trucks]; Remer v. City of El Cajon (1975) 52 Cal.App.3d 441 [newspaper vending boxes]; California Newspaper Publishers Assn., Inc. v. City of Burbank (1975) 51 Cal.App.3d 50 [newspaper racks].)

In deciding First Amendment claims in the context of regulatory statutes, however, the primary inquiry is not so much whether a particular mode of commu-

nication is protected - since "[t]he right of free speech necessarily embodies the means used for its dissemination . . . ." (Wollam v. City of Palm Springs, supra, 59 Cal.2d 276, 284) - but whether the statute or ordinance, though content-neutral, nevertheless unduly restricts First Amendment rights. (Baldwin v. Redwood City, supra, 540 F.2d 1360, 1370, fn. 28; Dullaney v. Municipal Court, supra, 11 Cal.3d at pp. 84-85; Dillon v. Municipal Court, supra, 4 Cal.3d 860, 869; Tribe, American Constitutional Law (1978) §12-2, pp, 581-582 (hereafter Tribe).) Constitutional analysis in First Amendment areas has consistently followed a balancing rather than a classifying approach (Baldwin v. Redwood City, supra, 540 F.2d 1360, 1365), discounting any artificial distinction as to whether the restrictive legislation is termed regulatory or prohibitory. (Goldblatt v. Hempstead (1962) 369 U.S. 590, 592; Baldwin v. Redwood City, supra, at p. 1370, fn. 28; Metromedia, Inc. v. City of San Diego (1980) 26 Cal.3d 848,

863, prob. jur. noted, 101 S.Ct. 265 (Dock. No. 80-195).) Viewing the matter from that perspective, courts have repeatedly upheld the exercise of the police power to prohibit the means or mode of communication in order to vindicate sufficiently important governmental interests, even though the prohibition impinges upon First Amendment freedoms. (See United States v. O'Brien (1968) 391 U.S. 367, 376; Metromedia, Inc. v. City of San Diego, supra, at pp. 866-867; see also Tribe, op. cit, supra, at p. 599.) The principles distilled from the relevant decisions discussing this balancing approach have been well stated in the form of a general rule in Baldwin v. Redwood City, supra (involving local regulations governing political sign posting on private property) as follows: "Incidental restrictions upon the exercise of the First Amendment rights may be imposed in furtherance of a legitimate governmental interest if that interest is unrelated to suppression of expression and is substantial in relation to the

restrictions imposed, and if the restrictions are no greater than necessary or essential to the protection of the governmental interest." (Id., at p. 1365.)[7]

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7. Where, as here, the regulatory provision is content-neutral requiring a case by case balancing approach, the use of the term "incidental" is to be considered as describing a resulting purpose and effect. That is to say, the casual effect - of whatever magnitude - on the protected activity must be merely incidental to the legislative purpose as distinguished from "insubstantial." (Cf., e.g., Fair Political Practices Com. v. Superior Court (1979) 25 Cal.3d 33, 47-48; see also Tribe, op. cit. supra, at pp. 602-603.) While we recognize that the scope of restrictions on free speech is an important factor to be considered in the weighing process (cf. Baldwin v. Redwood City, supra, 540 F.2d at pp. 1372-1373), a pivotal inquiry remains as to whether the governmental interests advanced are substantial in relation to

Thus, while section 25.04.090 establishes a blanket prohibition neutrally directed against all inanimate modes of expression on public property (within a regulatory scheme permitting placement of temporary election signs on private property (§ 25.12.130)), the test to be applied in determining whether it survives a constitutional challenge necessarily requires a balancing of competing interests. (Schneider v. State, supra, 308 U.S. at p. 161; Dulaney v. Municipal Court, supra, 11 Cal.3d at pp. 84-85.)

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7. (Continued) the restrictions imposed since, as previously noted, every regulation in a sense amounts to a prohibition. Consequently, Sussli's insistent claim of total prohibition rather than incidental restriction is wide of the mark, especially when the ordinance does not purport to apply to temporary election signs posted on private property.

In applying the correct constitutional standard, the trial court found that the content-neutral ordinance fostered significant governmental interests, which included traffic safety and aesthetic considerations, interests wholly unrelated to suppression of expression and rationally connected to the restrictions imposed.[8] (Cf. United States v. O'Brien, supra, 391 U.S. at p. 377; Metromedia, Inc. v. City of San Diego, supra, 26 Cal.3d 848, 858, 871.)

It is equally clear that the First Amendment interests involved in the display of political posters adjacent to public thoroughfares are substantial in

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8. Amici suggest other compelling interests involving potential liability exposure for negligently posted signs (see generally Gov. Code, § 835), and - somewhat suprisingly - as "publishers" of libelous political signs. (Cf. Good Government Group of Seal Beach, Inc. v. Superior Court (1978) 22 Cal.3d 672.)

nature. (Baldwin v. Redwood City, supra, 540 F.2d 1360, 1368.) As one distinguished commentator in the field of constitutional law has observed: "Two variables have been important in structuring the balancing process, and in deciding how heavy a burden of justification - and how large a sacrifice of other goals - to impose on government. The first has been the degree to which any given inhibition on communicative activity falls unevenly upon various groups in the society. . . . [¶] The second variable has been the degree to which the inhibition on communicative activity operates to shut down places that have traditionally been associated with the public exchange of views . . . ." (Tribe, op. cit. supra, at pp. 683-684.) In relation to the latter consideration, the City of San Mateo strenuously argues that not only has political sign posting on public property never been extended constitutional protection under the doctrine of traditional forums, but such a claimed right has been expressly rejected in the only

relevant reported decision. (See Brayton v. City of Anchorage, supra, 386 P.2d 832.) Moreover, the City asserts, the availability of private property-posting provides an adequate alternative forum for the exercise of the protected activity. (Cf. Young v. American Mini Theaters (1976) 427 U.S. 50 [plurality opinion by Stevens, J.].)

Of course, it is settled law that within the context of the traditional public forum, abridgement of the freedom of expression may not be conditioned upon the existence of alternative channels of communication. (Grayned v. City of Rockford (1972) 408 U.S. 104, 118; Schneider v. State, supra, 308 U.S. 147, 163; Wirta v. Alameda-Contra Costa Transit Dist., supra, 68 Cal2d 51, 59; and cf. Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899 (overuling Diamond v. Bland (1974) 11 Cal.3d 331); see also Tribe, op. cit. supra, p. 684.) Yet it is a factor to to be considered in attempting to strike the proper balance between the right of

free expression and legitimate governmental interests. (Baldwin v. Redwood City, supra, 540 F.2d 1360, 1368; cf., Metromedia, Inc. v. City of San Diego, supra, 26 Cal.3d 848, 868.)[9]

Certainly, the fact that "means of political communication are not entirely fungible; [and] political posters have unique advantages" (Baldwin v. Redwood City, supra, 540 F.2d 1360, 1368) should likewise be considered in the balancing process. As the state Supreme Court has noted in another context, "[a]bsent the presence of some conflicting interest that

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9. However, some pragmatic persuasion attaches to Sussli's hypothetical claim suggesting that even the use of alternative channels of communication such as media advertising or private property posting could be effectively foreclosed by reason of cost constraints or the very nature of the expression involved, e.g., proposed property tax increases or rent control issues.

could be protected in no other way, petitioners have the right to chose their own forum." (In re Hoffman (1967) 67 Cal.2d 845, 852, fn. 7 [leafletting in public railroad station].)

Thus, although the governmental purpose be legitimate and substantial, such purpose may not be achieved "by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. [Fn. omitted.]" (Shelton v. Tucker (1960) 364 U.S. 479, 488; Dulaney v. Municipal Court, supra, 11 Cal.3d 77, 84.) In balancing the competing interests shown to exist "precision of regulation must be the touchstone. . . ." (NAACP v. Button (1963) 371 U.S. 415, 438; People v. Fogelson (1978) 21 Cal.3d 158, 166. Regulations affecting protected First Amendment activities must be justified by something more than "mere legislative preferences or beliefs respecting matters of public convenience" (Schneider v. State, supra, 308 U.S. 147, 161) and are constitutionally permissible "only if they are clearly and

could be protected in no other way, petitioners have the right to chose their own forum." (In re Hoffman (1967) 67 Cal.2d 845, 852, fn. 7 [leafletting in public railroad station].)

Thus, although the governmental purpose be legitimate and substantial, such purpose may not be achieved "by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. [Fn. omitted.]" (Shelton v. Tucker (1960) 364 U.S. 479, 488; Dulaney v. Municipal Court, supra, 11 Cal.3d 77, 84.) In balancing the competing interests shown to exist "precision of regulation must be the touchstone. . . ." (NAACP v. Button (1963) 371 U.S. 415, 438; People v. Fogelson (1978) 21 Cal.3d 158, 166. Regulations affecting protected First Amendment activities must be justified by something more than "mere legislative preferences or beliefs respecting matters of public convenience" (Schneider v. State, supra, 308 U.S. 147, 161) and are constitutionally permissible "only if they are clearly and

narrowly drawn to avoid arbitrary and unnecessary curtailment of freedom of speech . . . ." (Kash Enterprises, Inc. v. City of Los Angeles, supra, 19 Cal.3d 294, 303.) The burden of establishing whether the regulation in question is sufficiently narrowly drawn in serving a compelling state interest is placed upon the government seeking to impose the regulation. (Verrilli v. City of Concord (9th Cir. 1977) 548 F.2d 262, 265; Talley v. California (1960) 362 U.S. 60, 66-67 (conc. opn.); Tribe, op. cit. supra, at p. 722, fn. 3.) Moreover, when First Amendment rights are at issue, a reviewing court must make an independent examination of the whole record in order to determine whether that burden has been satisfactorily met. (Zeitlan v. Arnebergh (1963) 59 Cal.2d 901, 909.) And, when the facts underlying a curtailment of First Amendment rights are uncontradicted, as here, the validity of the restriction presents a question of law. (L.A. Teachers Union v. L. A. City Bd. of Ed. (1969) 71 Cal.2d

551, 556.)

As earlier stated, the resolution of this legal question requires a balancing process. In weighing the competing interests at stake, we attach special significance to the compelling interest of the public in maintaining some semblance of visual harmony in the areas where they live. Thousands of tattered derelict signs from past elections testify to the difficulty of protecting public property from unsightly signs even where laws forbid public posting. Without such laws one foresees an absolute end to the already eroded aesthetic integrity of public places in a tidal wave of publicly sponsored graffiti.[10]

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10. The rational basis for differentiating between political signs relating to specific elections and those which pertain to the conduct of government in general seems tenuous at best. (Cf. Wirta v. Alameda- Contra Costa Transit Dist., supra, 68 Cal.3d 51.) If the

We find it difficult to understand how the legitimate purpose of preventing this inundation could be more "narrowly achieved" - how local government can keep election placards from public poles on public property except by an ordinance prohibiting them.

It may well be that, in circumstances not easily imagined, such an ordinance will, because of overbreadth, have the effect of contravening First Amendment rights. But that overbreadth, if it exists, has imposed no prejudice that we are able to discern upon the appellant Sussli,

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10. (Continued) subject ordinance falls, it is difficult to rationalize a valid basis for prohibiting the public posting of signs ranging from "Question Authority" to "Save the Red Brigade" or "Down with the Shah". It is, indeed, probably that the county could then be required to provide public space for any noncommercial message, such as "Roommate Desired" or "Merry Christmas".

whose injury seems entirely hypothetical. It is a well-settled principle of constitutional law that "one will not be heard to attack a statute on grounds that are not shown to be applicable to himself, and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations." (In re Cregler (1961) 56 Cal.2d 308, 313; and cf. United States v. Raines (1960) 362 U.S. 17, 21-22; Rubio v. Superior Court (1979) 24 Cal.3d 93, 103; People v. Maugh (1969) 1 Cal.App.3d 856, 862.)

A sometimes exception to this rule will obtain "where a provision restricting free speech and the free dissemination of ideas is involved," in which case a court, in considering overbreadth or vagueness, "may take into account the operation of the provision as to factual situations other than the one at bar." (Fort v. Civil Service

Commission (1964) 61 Cal.2d 331, 339.) No constitutional duty, however, mandates invoking this exception where it is contrary to the express desire of the people of the cities of California to control the proliferation of urban clutter.

In arriving at this conclusion, we would stress that those who follow in Sussli's footsteps will, like him, have available to them innumerable modes of political expression in both private and public forums, including the unchallengable right to use public places for traditional speech. To say that this is insufficient merely because it is incomplete, and that every man has at all times an unabridgible right to use every possible means of expression irrespective of any legitimate counteravailing public interest, seems to us erroneous.

For these reasons we conclude that the trial court correctly concluded that the ordinance at issue is constitutionally permissible.

The judgment is affirmed.

_____

Newsom, J.

I CONCUR:

_____

Elkington, J.

APPENDIX C

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF
SAN FRANCISCO

No. 210801
MEMORANDUM DECISION

JOHN F. CONDON, et al.,
Plaintiffs,

v.

CITY OF SAN MATEO, et al.,
Defendants.

The question is whether an ordinance of the City of San Mateo which forbids the posting of election campaign signs on public property is unconstitutional. The ordinance does not regulate, by specifying places, times or conditions, but

proscribes posting on any public property. On the other hand, the City's regulatory ordinance applying to signs on private property is very liberal. It affords ample opportunity for a candidate who can attain the use of private property for display of the candidate's name, picture, and whatever favorable declaration may be associated with his or her person, or the display of signs relating to propositions on the ballot.

Apparently, there is not only a lack of California case law on the subject, but there is also almost complete absence of authority anywhere. In one Alaska case, Brayton v. City of Anchorage, 386 Pac. 2d 832, an ordinance similar to that of the City of San Mateo was upheld. The brief decision contains almost no discussion; the court simply relied upon uncited "similar cases" and upon Schneider v. State, 308 U.S. 147. Schneider, however, is the leading case on the right of persons acting as advocates of a cause (in that case they were Jehovah's Witnesses)

to pass out handbills on the streets, even though littering inevitably occurred.

The court in Schneider did refer to permissible restraints, not present in the case, such as forbidding deliberate throwing of material onto a street, obstructing traffic by standing in the middle of a street, or forming a cordon which would prevent a pedestrian to pass unless he would accept a leaflet. But it would seem that more substantial reason for the decision in the Brayton case than the dictum in a case the decision of which goes in the other direction might have been supplied. It appears from a reading of Brayton that the main controversy was not about the constitutional matter, but about liability for costs.

In California, the problem has not been resolved. The Supreme Court expressly has reserved the question "under what circumstances public property must be made available, if at all, as a forum for First Amendment activities". Dulaney v. Municipal Court, 11 C.3d 77, 83, fn. 6.

See also, Wirta v. Alameda-Contra Costa Transit District, 68 Cal.2d 51, 54, fn.1. The case, therefore, is one of first impression.

This court decides that the ordinance is not unconstitutional on its face. The principal reason is that by blanket denial of the use of the City's property for political purposes, the City maintains neutrality; it does not give any semblance of partiality.

A brief narration of the facts and explanation of the evidence is in order. Plaintiff Condon, an incombent councilman who was running for re-election, had his name exhibited (presumably by a supporter) on a campaign placard which was attached to one or two poles on sidewalks. The poles had supported directional signs, but the signs had become detached and plaintiff's cards were attached to the truncated posts. Removal was demanded. Plaintiffs sought use of other public property. Upon refusal, they petitioned for declaration of their rights to the use

of public property generally and injunction against removal of his or any other candidate's election signs from public property. A temporary restraining order was issued, and an order to show cause; answer was filed, and the cause has been tried and awaits this decision. Although the election was held in March, 1977, both parties urge that the matter be not considered moot, because of the public interest in the question and of the desirability of guidance for public officers and of candidates for election. The cause has been transferred by the Supreme Court where writ was sought, to the Court of Appeal and then to this Court, wherefore dismissal upon the ground of mootness would be unbefitting. At trial, plaintiff's counsel was asked what properties of the City would be appropriate for use in the display of candidates' signs. It seems to this Court that in order to have the ordinance declared unconstitutional on its face, a showing should be made that its

proscriptions unreasonably interfere with a candidate's constitutional right to free speech and dissemination of information, even if this be of no more than the candidate's name, and that this showing should give some specification of the desired places of display. The disjoined posts would seem to be few and inappropriate in that each probably could not accommodate more than one or two names [favoritism must be avoided] and in that they may be so placed, that being designed for guidance, as to cause distraction of the motorist or pedestrian.

Use of public buildings and vehicles of police, fire, health and other departments obviously is subject to prohibition. It was suggested that public parks and, in particular, a long ornamental fence surrounding the principal park could be used. But here we have the matter of aesthetics. It does not appear unconstitutional on the face of the matter for the city to preserve the beauty of its park and its adornments, and also to prevent liability

because of possibly insecure postings. It was suggested that the islands in the curving streets of domestic areas could be used. But here there are the problems of distraction of drivers, of gaining equality of display for all candidates and also of aesthetic preservation. The corporation yard, the land around the public library, and vacant land owned by the City near the golf course were also proposed as possible sites for poles or standards to support candidates' signs. But even as to a vacant lot, there would be the problem of assuring that the supports for the signs were secure (to protect against accidents) and that there would be equality in number of signs for each candidate or for or against each proposition on the ballot, and in visibility and desirability of location. If some candidates or parties were unable to finance signing, and others could, partiality of the City might be suspected by the viewer who would not be informed of the facts. Then there would be the need

for the city to protect the signs on its lots from trespassers, despoilers and over-zealous partisans in order to preserve neutrality.

Apart from the consideration of the unsuitability of particular property from the standpoints of safety, aesthetics and the like (upon which there was expert testimony), as said above, there is the fundamental matter of neutrality by the non-use of all property. The citizen who maintains public property is entitled to protection against its use by candidates to whom he is opposed and even by those he favors but to whom he does not care to lend the appearance of the City's support. The City Council has decided to give this protection (as well as protection in the other areas described above), and the constitutionality of its action is presumed.

No only is actual impartiality but also the appearance of neutrality preserved by the ordinance. The incumbent cannot be suspected of having gained a

favored site, nor can a measure on the ballot which the City Council favors gain preference. The totality of the proscription allays the apprehension that "There could be lurking doubts about favoritism, and sticky problems might arise in parceling out limited space to eager politicians." Lehman v. City of Shaker Heights, 418 U.S. 298, 304.

Moreover, the City of San Mateo has left exceedingly free the posting of signs on private property. Although the existence of such alternatives would not justify the prohibition were it otherwise invalid, it is "a factor to be considered in striking the appropriate accommodation between free speech and legitimate governmental interests." Baldwin v. Redwood City, 540 F.2d 1360, 1368.

Cases involving other situations are to be distinguished.

(1) When a city has "opened the forum" by inviting political acts of exhibits, it may not create a standardless

licensing system. Dulaney v. Municipal Court, 11 C.3d 77, 88. Nor may it decline to accept advertisements of particular political beliefs within the opened forum. Wirta v. Alameda-Contra Costa Transit Dist., supra, Danskin v. San Diego Unified School Dist., 28 C.2d 536, and by the United States Supreme Court in Marsh v. Alabama, 326 U.S. 501.

(2) The cases in which persons appear on public property to pass out pamphlets, Schneider v. State, supra; to picket, Police Department of Chicago v. Mosley, 408 U.S. 92; to broadcast, etc., Wollam v. City of Palm Springs, 59 C.2d 276, are essentially distinguishable from the present case. In those cases, the actors simply proceed to use their First Amendment rights. They are the actors and although they may stand on by-ways and open places, they are not supplied by the city with property opon which their messages may remain day and night.

In one class of cases, the living person is dominant; the place in which he campaigns or demonstrates or orates is secondary. In the other case, the property would be the dominant factor displaying an inanimate image throughout a campaign and in danger of giving the appearance of favoritism.

(3) Baldwin v. Redwood City, 540 F.2d 1360 is a case of impermissible requiring of a permit for political signs on private property. There was no challenge to Redwood City's ordinance 3.138 which forbids such signs on public property. Obviously, neutrality was not an issue. That the owner of private property may exhibit partianship is indisputable. Clearly, First Amendment rights were violated. The effect of the City of San Mateo ordinance is to keep the city out of the political arena while allowing wide use of private property for display of campaign signs.

(4) The newsrack cases, in which too stringent regulation has been violated, California Newspaper Publishers Assn., Inc. v. City of Burbank, 51 C.A. 3d 50; Kash Enterprises v. City of Los Angeles, 19 C.3d 294, are to be distinguished from the case at hand. A newspaper is very different from a campaign poster. If it be true to its purpose, it is a disseminator of information and of ideas on many subjects. It may, indeed, be partisan; but its multifold functions and its continued reliance on satisfaction of its purchasers make its availability on newsracks distinguishable from campaign signs in that the city itself does not give the appearance of partiality.

It may be observed (although this is not by any means the main reason for the judgment), that there seems to be no demand from persons or organizations devoted to civil liberties that the City's position for neutrality ought to be disapproved on First Amendment grounds. Undoubtedly, plaintiffs have standing to

assert their claim. But the common acceptance of ordinances preserving the neutral position of governmental units in election contests is not to be overlooked.

To conclude: property of a city may be denied the use by campaign signs in election contests, chiefly in order to preserve the actual and apparent neutrality of the city in affairs being decided by the voters.

Counsel for defendants will prepare findings of fact, conclusions of law and judgment.

DATED: June 19, 1978

(Prestin Devine)

Judge of the Superior Court

(Assigned)

APPENDIX D

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IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

No. 210801

FINDINGS OF FACTS AND
CONCLUSIONS OF LAW

JOHN F. CONDON and EUGENE SUSSLI,
Plaintiffs,
v.
CITY OF SAN MATEO, et al.,
Defendants.

This cause came on regularly for trial on March 1, 1978 in Department 17 of the above-entitled court, the Honorable Preston Devine, Judge (assigned) presiding, sitting without a jury, a jury having been duly waived. Plaintiffs appeared by their attorney William F. Murphy. Defendants appeared by their attorney, Lyle L. Lopus. Evidence, both oral and documentary, was presented by the parties.

The Court, having heard the oral testimony, examined the documentary evidence introduced, heard the arguments of counsel, and having received and considered the written memoranda of the parties, the cause having been submitted for decision, and being fully advised in the matter, makes the following findings of fact:

FINDINGS OF FACT

1. Plaintiffs Condon and Sussli were both candidates for the City Council of the City of San Mateo in the consolidated election which was held on March 8, 1977.

2. Defendant City of San Mateo is, and was at all times herein relevant, a chartered city and a municipal corporation duly organized and existing under the laws of the State of California.

3. Prior to the aforementioned March 8, 1978 election, plaintiffs Condon and Sussli, and/or their respective supporters, posted, or caused to be posted, signs in support of their respective candidacies on public property within the City of San Mateo. At least one such sign supporting the candidacy of plaintiff Condon was posted upon an otherwise bare metal pole set in the public sidewalk adjacent to a public street in San Mateo's downtown.

4. At the time said signs were posted, defendant City's Municipal Code contained a Title 25, which title set forth regulations pertaining to the installation and maintenance of signs within defendant City. A true copy of all of said Title 25 was offered and admitted into evidence as plaintiffs' Exhibit 1.

5. Plaintiffs Condon and Sussli were notified, by defendant City's

letter dated February 8, 1977, that election signs had been observed posted on public property and of defendant City's intent to summarily remove all such signs found to be still in place six days following said notification.

Plaintiffs were further notified that such sign posting constituted a violation of Title 25's Section 25.04.090, which provides as follows:

> 25.04.090 POSTING ON PUBLIC PROPERTY PROHIBITED. No person, except a duly authorized public officer or employee, shall erect, construct or maintain, paste, paint, print, nail, tack, or otherwise fasten or affix, any card, banner, handbill, campaign sign, poster, sign, advertisement, or notice of any kind, or cause or suffer the same to be done, on any curbstone, lamppost, pole, bench, hydrant, bridge, wall, tree, sidewalk, or structure in or upon any public street, alley, or upon any other public

> property, except as may be required or permitted by ordinance or law; no person shall deface, mar or disfigure any bridge, fence, building or other structure belonging to city, or any tree located in any public property or place, by painting, cutting, scratching or breaking the same, or attaching or affixing anything thereto.

Plaintiffs were further notified, by the same letter, of the provisions of Section 25.12.130 of Title 25, which read as follows:

> 25.12.130 ELECTION SIGNS. An election sign is a temporary sign as defined in Section 25.08.310. A permit shall be required pursuant to Sections 25.04.040 and 25.04.050 for placement of all elections signs, except that no fee shall be required of a property owner who places such signs on his own property, and only one permit shall be required for each

candidate or ballot measure when a person is authorized by the candidate for election or an election committee to place such signs.

The placement of election signs shall be limited as follows:

1. No sign shall be placed or erected on any premises within this city without the consent of the owner of said premises.

2. No sign shall be placed or erected earlier than six weeks prior to the election date.

3. All signs must be removed no later than the tenth day after the election, and in order to insure such removal, each permit applicant shall deposit the sum of twenty-five dollars to be fully refundable if the signs are removed within the ten days. Failure to remove all signs shall result in a

forfeiture of said deposit to defray the city's cost of removal.

4. No election sign shall be placed of such size or in such manner as to pose a visibility hazard to pedestrian and motor vehicle traffic along the public highway, sidewalks or at street level.

6. Plaintiff Condon, through his attorney responded to the City's aforementioned notification, contending that:

a) The aforementioned Section 25.04.090 of Title 25, read in conjunction with other provisions of said Title, did not on its face prohibit the posting of election signs on public property;

b) That, even if Section 25.04.090 was effective on its face to impose a prohibition on the posting of election signs on public property such signs could not be lawfully removed by the City except pursuant to formal, noticed procedures for the abatement of nuisances

set forth in the City's Municipal Code; and

c) That, if Section 25.04.090, by its terms, prohibited the placement of campaign signs on public property, its enforcement would constitute a violation of plaintiff Condon's right of free speech under the First and Fourteenth Amendments to the United States Constitution and under Article I, Section 9, of the California State Constitution.

7. Campaign signs found posted on public property past the deadline set out in the aforementioned letter of defendant City were summarily removed by City personnel, and plaintiffs commenced their instant lawsuit against defendants.

8. The San Mateo Municipal Code imposes no restrictions on the size or number of election signs that may be lawfully posted on private property, provided that the consent of property owners is obtained and that such signs will create no threats to public safety.

9. Defendant City's total prohibition against posting election signs on public property is, given the

availability of private property for this purpose, an incidental restriction on sign posting as a means of expression.

10. Defendant City's total prohibition against posting election signs on public property is in furtherence of the following governmental interests, which interests are substantial in relation to the restriction imposed:

a. Preservation of public confidence in the neutrality and impartiality of municipal officials in election contents,

b. Prevention of alteration of damage to, and/or defacement or appropriation of, public property; especially when such damage, alteration, defacement and/or appropriation would produce a threat to the public safety,

c. Protection of the public from the blare of political propaganda,

d. Avoidance of administrative burdens, including the even-handed parceling out desirable sign posting sites, which would follow from an inevitable need to regulate the placement

of signs on public property were such property opened to political sign posting,

e. Preservation of lines of sight required to foster traffic safety,

f. Preservation of the prominence of public signs, including traffic signs, which prominence would be diluted were election signs posted nearby,

g. Preservation of the attractiveness of public property and of nearby private property, and

h. Avoidance of creating the temptation to enter, in order to post signs, upon publically owned property not generally open to the public and thus, whose safety is not assured.

11. The aforementioned governmental interests furthered by the City's total prohibition against posting election signs on public property are unrelated to the suppression of free speech.

12. Defendant City's total prohibition against posting election signs on public property is no broader than necessary or essential to protect the

aforementioned governmental interests which the prohibition furthers.

13. The issues of whether Title 25 by its terms prohibits the posting of election signs on all public property within San Mateo, whether election signs posted on public property may be summarily removed by City personnel, and whether a total prohibition on posting election signs on public property is valid under the United States and California Constitutions are likely to be raised again unless finally decided by judicial determination. Given the relatively short time periods prior to elections during which election signs are apt to be posted, and thus, during which these issues would be apt to arise, their final resolution will be difficult or impossible if the case is found to be moot.

CONCLUSIONS OF LAW

1. Title 25 of the San Mateo Municipal Code, by its terms, totally prohibits the posting of election signs on all public property within the City of San Mateo.

2. Defendant City's aforementioned prohibition on election sign posting is reasonable and is not unconstitutional.

3. Election signs posted in volation of the aforementioned prohibition are lawfully subject to summary removal by City personnel without resort to the formal nuisance abatement procedures set out in the City's municipal code.

4. The restraining order heretofore issued to prevent enforcement of the aforementioned sign posting prohibition and summary removal of election signs posted in violation of said prohibition should be dissolved.

5. This case is not moot.

6. Defendants should be awarded their costs of suit herein.

DATED: August 24, 1978

/s/ Preston Devine
PRESTON DEVINE
Judge of the Superior Court (assigned)

APPENDIX E

Municipal Court of San Mateo §25.04.140

25.04.140 TRAFFIC HAZARD. No sign shall be erected at or near the intersection of any street in such a manner as to obstruct free and clear vision, or at any location where, by reason of the position, shape or color, it may interfere with, obstruct the view of, or be confused with any authorized traffic sign or signal device; or which makes use of the words "Stop", "Go", "Caution", "Look", "Danger", or any other word, phrase, symbol or character in such a manner as to interfere with, mislead or confuse traffic.

Municipal Code of San Mateo §25.12.130

25.12.130 ELECTION SIGNS. An election sign is a temporary sign as defined in Section 25.08.310. A permit shall be required pursuant to Sections 25.04.040 and 25.04.050 for

placement of all election signs, except that no fee shall be charged therefor, no permit shall be required of a property owner who places such signs on his own property, and only one permit shall be required for each candidate or ballot measure when a person is authorized by the candidate for election or an election committee to place such signs.

The placement of election signs shall be limited as follows:

1. No sign shall be placed or erected on any premises within this city without the consent of the owner of said premises.

2. No sign shall be placed or erected earlier than six weeks prior to the election date.

3. All signs must be removed no later than the tenth day after the election, and in order to insure such removal, each permit applicant shall deposit the sum of twenty-five dollars to be fully refundable if the

signs are removed within the ten days. Failure to remove all signs shall result in a forfeiture of said deposit to defray the city's cost of removal.

4. No election sign shall be placed of such size or in such manner as to pose a visibility hazard to pedestrian and motor vehicle traffic along the public highway, sidewalks or at street corners.

Opposition

No. 81-673

Office - Supreme Court, U.S.
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NOV 2 1981

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

EUGENE SUSSLI
Petitioner,

VS.

CITY OF SAN MATEO,
A MUNICIPAL CORPORATION, et al.,
Respondents.

On Petition for a Writ of Certiorari to
The Court of Appeal
of the
State of California
First Appellate District, Division One

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QUESTION PRESENTED

Whether an ordinance which prohibits all private sign postings—including political signs—on public property (political signs being expressly permitted on private property with the owner's consent) violates First and Fourteenth Amendment free speech guarantees.

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No. 81-673

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

EUGENE SUSSLI
Petitioner,

VS.

CITY OF SAN MATEO,
A MUNICIPAL CORPORATION, et al.,
Respondents.

On Petition for a Writ of Certiorari to
The Court of Appeal
of the
State of California
First Appellate District, Division One

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for writ of certiorari, seeking review of the opinion of the California Court of Appeal reported at 120 Cal. App. 3d 1, 173 Cal. Rptr. 781.

A. Statement of the Case

The opinion affirms the validity of § 25.04.090 of the San Mateo Municipal Code which reads:

> "25.04.090 POSTING ON PUBLIC PROPERTY PROHIBITED. No person, except a duly authorized public officer or employee, shall erect, construct or maintain, paste, paint, print, nail, tack or otherwise fasten or affix, any card, banner, handbill, campaign sign, poster, sign, advertisement, or notice of any kind, or cause or suffer the same to be done, on any curbstone, lamppost, pole, bench, hydrant, bridge, wall, tree, sidewalk, or structure in or upon any public street, alley, or upon any other public property, except as may be required or permitted by ordinance or law; no person shall deface, mar or disfigure any bridge, fence, building or other structure belonging to city, or any tree located in any public property or place, by painting, cutting, scratching or breaking the same, or attaching or affixing anything thereto." (120 C.A. 3d at 3, n. 1.)

Section 25.12.130 of said code allows election signs on private property with the owner's consent. (120 C.A. 3d at 3, n. 2.) Only § 25.04.090 is challenged.

Petitioner, a candidate for city council, posted political signs on public property. When City removed them, he sued for injunctive and declaratory relief alleging § 25.04.090 was an impermissible abridgment of free speech. (120 C.A. 3d at 3-4.)

The answer denied this and alleged the section was justified on the ground of these governmental interests: 1) prevention of damage to public property; 2) preservation of public confidence in the neutrality of elections; 3) protection of the public from the blare of political propaganda; 4) avoidance of administrative burdens associated with the need to monitor the placement of signs

on public property and their eventual removal; 5) preservation of the prominence of public signs and lines of sight in the interests of traffic safety; and 6) aesthetic considerations. (120 C.A. 3d at 4, n. 5.)

The trial court took evidence, found that in light of the permissible posting of election signs on private property such interests were substantial, and concluded that the section was constitutionally permissible. (120 C.A. 3d at 4, 11.)

The Court of Appeal affirmed, Presiding Justice Racanelli dissenting. Applying the "balancing of competing interests" test which seeks "to strike the proper balance between the right of free expression and legitimate governmental interests" (120 C.A. 3d 6-9) the Court majority concluded (120 C.A. 3d at 9-11):

> "In weighing the competing interests at stake, we attach special significance to the compelling interest of the public in maintaining some semblance of visual harmony in the areas where they live. Thousands of tattered derelict signs from past elections testify to the difficulty of protecting public property from unsightly signs even where laws forbid public posting. Without such laws one foresees an absolute end to the already eroded aesthetic integrity of public places in a tidal wave of publicly sponsored graffiti.
>
> "We find it difficult to understand how the legitimate purpose of preventing this inundation could be more 'narrowly achieved'—how local government can keep election placards from public poles on public property except by an ordinance prohibiting them. . . .
>
> ". . . [T]hose who follow in Sussli's footsteps will, like him, have available to them innumerable modes of

political expression in both private and public forums, including the unchallengeable right to use public places for traditional speech. To say that this is insufficient merely because it is incomplete, and that every man has at all times an unabridgable right to use every possible means of expression irrespective of any legitimate countervailing public interest, seems to us erroneous.

"For these reasons we conclude that the trial court correctly concluded that the ordinance at issue is constitutionally permissible.

"The judgment is affirmed."

B. Reasons Why the Writ Should Be Denied

1. The Court of Appeal's Opinion is in Accord with the Authorities

In *Lehman v. City of Shaker Heights* (1974) 418 U.S. 298, a public transportation system was held entitled to reject the placement of election signs (car cards) on its public transit commuter cars although it permitted car cards containing other types of advertising. Justice Blackmun, announcing the judgment (affirming the Ohio Supreme Court's decision, 34 Ohio St.2d 143, 296 N.E.2d 683), stated (418 U.S. at 299):

> "This case presents the question whether a city which operates a public rapid transit system and sells advertising space for car cards on its vehicles is required by the First and Fourteenth Amendments to accept paid political advertising on behalf of a candidate for public office."

Holding the city was not so required, the Court stated (418 U.S. at 304) that limiting car card space to less controversial commercial and service oriented advertising

"does not rise to the dignity of a First Amendment violation." The Court said (p. 304):

> "Were we to hold to the contrary display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require."

And further (p. 304):

> "Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. . . . The city consciously limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience."

Justice Douglas, concurring, held that the commuting public, like the driving public, was a captive audience before whom the candidate had no constitutional right to spread his message. He said (pp. 306, 308):

> "Bus and streetcar placards are in the category of highway billboards which have long been used to display an array of commercial and political messages. But this particular form of communication has been significantly curtailed by state regulation adopted pursuant to the Highway Beautification Act of 1965, 23 U.S.C. § 131, which conditions certain federal highway funds upon strict regulation of highway advertising. Ohio is among the States which have sought to protect the intrests of their motorists by enacting regulations pursuant to the Act. . . ."

> "Since I do not believe that petitioner has any constitutional right to spread his message before this captive audience, I concur in the Court's judgment."

Justice Brennan, dissenting, stated (p. 310):

> "I would reverse. In my view, the city created a forum for the dissemination of information and expression of ideas when it accepted and displayed commercial and public service advertisements on its rapid transit vehicles. Having opened a forum for communication, the city is barred by the First and Fourteenth Amendments from discriminating among forum users solely on the basis of message content."

Justice Brennan's dissent is as far as the courts have gone in holding that the First and Fourteenth Amendments guarantee use of public property for political advertising. In the instant case there has been no opening of the forum.

In *Danskin v. San Diego Unified School Dist.* (1946) 28 Cal.2d 536, 545, the court said,

> "The state is under no duty to make public school buildings available for public meetings,"

but it held that the state could not make them available to some groups and not others, for example, not to groups which advocate overthrow of the government by force, violence, or other unlawful means because free speech encompasses such advocacy and the state could not require the giving up of a constitutional right as a precondition to use of school buildings. A writ of mandate issued ordering a school board to grant permission to use a school auditorium without condition.

In *Brayton v. City of Anchorage* (1963) 386 P.2d 832, an ordinance prohibited private signs on public property.

Candidate Brayton attached 50 political posters to city utility poles. The city removed them and sued him for the cost of removal. Judgment for the city was affirmed. The court rejected his contention that the ordinance "violates his right to freedom of speech and of press as guaranteed under the First and Fourteenth Amendments." It affirmed the finding below "that appellant had committed a trespass and that appellee was entitled to reimbursement for the cost of restoring the property to its original state."

In *Peltz v. City of South Euclid* (1967) 11 Ohio St.2d 128, 228 N.E.2d 320, an ordinance prohibited political signs on public and private property. Candidate Peltz sought to put a political sign on his own front lawn. The court held the ordinance invalid. It stated that a municipality

> "may enact ordinances prohibiting the attachment of political posters to public property and permitting recovery of the cost of removal of such posters. *Brayton v. City of Anchorage, Alaska,* 386 P.2d 832. It may not, on the other hand, enforce a wholesale prohibition against them."
>
> "The ordinance in question sweeps away the right of a property owner to express his opinion on his own property."

In *Ross v. Goshi* (1972) 351 F.Supp. 949, the ordinance prohibited all outdoor political signs. Invalidating this selective and total prohibition of political signs, the court quoted from *Peltz* that a municipality may prohibit political posters on public property but cannot enforce a wholesale prohibition against them. In the instant case the City has not enacted a wholesale prohibition.

2. Presiding Justice Racanelli's Dissent Shows that the Court of Appeal's Opinion is Correct

A dissent may highlight the correctness of a majority opinion. Such is here the case.

The dissenting opinion, not mentioned in the petition, states (1st par.),

> "the use of privately mounted temporary political placards or notices inoffensively placed upon a public sidewalk either with the consent of or by the occupier of abutting business premises [is a] time-honored means of political expression," "a long established method of political expression." (4th par.) (120 C.A. 3d at 11, 13.)

That statement is erroneous—not supported by the record, not a matter that can be judicially noticed under Ev. C. § 451, or pursuant to Ev. C. §§ 452, 453.* There was no request to the trial court that judicial notice be taken of such a matter. (Ev. C. § 453.) Privately mounted political placards upon a public sidewalk are not a time-honored, long-established, method of political expression. No evidence was adduced that it is. No court has held it is. The dissent violates the law respecting judicial notice (Ev. C. §§ 452, 453, 459) and procedural due process. City was never given opportunity to meet a request (none was made) that it be judicially noticed that use of privately mounted temporary political placards or notices inoffensively placed upon a public sidewalk either with the consent or by the occupier of abutting business premises

*Evidence Code ("Ev. C.") references are to the California Evidence Code.

is a time-honored means, a long-established method, of political expression. (Ev. C. §§ 453(a), 459(d).)

The dissent and the petition cite *Hague v. CIO* (1939) 307 U.S. 496, 515, which invalidated an ordinance prohibiting public assembly in or on streets and parks of Jersey City without a permit from the Director of Public Safety who was authorized to refuse a permit if of the opinion that his refusal would prevent riots, disturbances or disorderly assemblage. Distinguishing *Davis v. Massachusetts*, 167 U.S. 43, which sustained Davis' conviction of speaking on Boston Common without a permit in violation of an ordinance which prohibited speaking, discharging fire arms, selling goods, or maintaining any booth for public amusement on any public grounds without a permit, Justice Roberts said (307 U.S. at 515):

> "In the instant case the ordinance deals only with the exercise of the right of assembly for the purpose of communicating views entertained by speakers, and is not a general measure to promote the public convenience in the use of the streets or parks.
>
> "We have no occasion to determine whether, on the facts disclosed, the Davis Case was rightly decided, but we cannot agree that it rules the instant case. Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

Justice Roberts did not say, and it is not a fact, that streets or parks have time out of mind been used to mount political placards. And § 25.04.090 *is* "a general measure

to promote the public convenience in the use of the streets or parks" and other public property.

Cohen v. California (1971) 403 U.S. 15, cited in the dissenting opinion, held that Cohen had a constitutional right to walk through a courthouse corridor, in the presence of women and children, wearing a jacket bearing the political message, "Fuck the Draft." His conviction of disturbing the peace was reversed. *Cohen* does not hold that a constitutional right exists to mount such signs on public property or that public sidewalks are a traditional forum for political signs.

The Court of Appeal's opinion states (120 C.A. 3d 10, n. 10):

> "If the subject ordinance falls, it is difficult to rationalize a valid basis for prohibiting the public posting of signs ranging from 'Question Authority' to 'Save the Red Brigade' or 'Down with the Shah.' It is, indeed, probable that the county could then be required to provide public space for any noncommercial message, such as 'Roommate Desired' or 'Merry Christmas.'"

Four-letter vulgarisms are a robust and common method of expressing political opinions. Government may not regulate the content of First Amendment freedoms. (*Dulaney v. Municipal Court* (1974) 11 Cal.3d 77, 85.) Censorship is not permitted. "[O]ne man's vulgarity is another man's lyric." (403 U.S. at 25.) "[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (*Police Dept. of the City of Chicago v. Moseley* (1972), 408 U.S. 92, 95.)

Section 25.04.090 has nothing to do with restricting expression because of its message, ideas, subject matter, or content.

In *Baldwin v. Redwood City* (1976) 540 F.2d 1360, cited in the dissent and in the petition, the ordinance was held invalid because it prohibited election signs on private property in residential areas. It also prohibited their placement on public property (§ 3.138; 540 F.2d at 1363) but that part of the ordinance (§ 3.138) was not attacked and was not invalidated. The action was brought by residential property owners Baldwin and Cannon, supporters of candidate Kerwin. They wished to put his signs on their own property. *Baldwin* does not hold that the public sidewalk is a traditional forum on which to mount political placards.

Other decisions cited in the dissent were wider of the mark. None is relied on by petitioner. None holds the public sidewalk is a traditional forum on which to mount political placards.

3. The Court of Appeal's Opinion Is in Accord With Reason

Posting private signs on public property where there has been no opening of the forum is not reasonable.

Imagine such postings on public ways, buildings, parks, equipment, to say nothing of the messages they might project in light of government's inability to regulate the content of First Amendment freedoms.

Freedom of speech and assembly does not warrant trespass on private property; it is not reasonable that

it do so on public property. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." (*Adderley v. Florida* (1966) 385 U.S. 39, 48, trespass convictions affirmed.)

As "there is no 'unabridgable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish'" (*FCC v. National Citizens Comm. For Broadcasting* (1978) 436 U.S. 775, 779), so there is no such right to post public property with private signs.

4. The Authorities Cited in the Petition Do Not Indicate that the First and Fourteenth Amendments Guarantee the Right to Post Private Signs on Public Property

The authorities the petition cites, in addition to those noted in section 2, above, hold as follows:

In *Grayned v. City of Rockford* (1972) 408 U.S. 104, an ordinance permitted peaceful picketing of any school involved in a labor dispute, and prohibited other school picketing. Held this selective prohibition violated the equal protection clause of the Fourteenth Amendment. A conviction of peaceful picketing not involving a labor dispute was reversed.

Here the City has not permitted some, and prohibited other, private signs on public property.

In *Metromedia, Inc. v. City of San Diego* (1981) ..... U.S. ....., 101 S. Ct. 2882, the part of an ordinance prohibiting billboards on private property used for display of certain commercial advertisements (on-site permitted,

off-site prohibited), designed to be viewed from streets and highways, was by the plurality opinion sustained on the ground that its goals—eliminating traffic hazards and improving the city's appearance—were substantial governmental goals and not broader than necessary. A part of the ordinance which permitted some, and prohibited other, noncommercial billboard advertising on private property was by the plurality held to infringe free speech because, "With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: . . . ." (101 S. Ct. at 2896.)

In *Linmar Associates, Inc. v. Township of Willingboro* (1977) 431 U.S. 85, an ordinance prohibiting "For Sale" and "Sold" signs on private property—purpose being to stem the flight of white homeowners from a racially integrated community—was held to violate free speech.

In *Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 41, 47, judicially promulgated rules of professional responsibility prohibiting ambulance chasing were held not to violate free speech. A suspension of a lawyer who violated the rules was affirmed.

In *N.A.A.C.P. v. Button* (1963) 371 U.S. 415, a judgment denying relief against a Virginia statute which prohibited any arrangement by which prospective litigants were advised to seek legal assistance from N.A.A.C.P. attorneys regarding civil rights violations was reversed because the statute interfered with free speech rights.

In *Schad v. Borough of Mount Ephraim* (1981) ..... U.S. ....., 101 S. Ct. 2176, a zoning ordinance which prohibited the viewing on private property in a commercial zone of a

live nude dancer from behind a glass panel was held to violate protected expression under the First Amendment.

In *Village of Schaumberg v. Citizens for a Better Environment* (1980) 444 U.S. 620, an ordinance forbidding door-to-door or on-street solicitation of contributions by charitable organizations not using at least 75% of their receipts for charitable purposes was held to violate the First Amendment.

In *Shuttlesworth v. City of Birmingham* (1969) 394 U.S. 147, conviction of a Negro minister of violating an ordinance prohibiting participation in street parades, processions or other public demonstrations without a permit from the City Commission which had virtually absolute power to deny a permit, was reversed because the ordinance violated First Amendment freedoms.

In *Kunz v. People of State of New York* (1951) 340 U.S. 290, conviction of a Baptist minister of violating an ordinance prohibiting the holding of public worship meetings on the streets without a permit from the police commissioner was reversed because the ordinance vested control in the commissioner without appropriate standards to guide his actions.

CONCLUSION

It is respectfully urged that the Court of Appeal's opinion is correct and that the petition is without merit and should be denied.

Dated: November 2, 1981

Respectfully submitted,

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